rule to the connected discipline, asking the Board to explain why the two should be treated separately. In its decision responding to the remand, the Board held that if the rule itself lay at the "core" of entrepreneurial control, and was thus not a mandatory bargaining subject, then neither was the discipline. *Peerless Publications (Pottstown Mercury)*, 283 NLRB 334 (1987). Curiously, however, it retreated from its previous recognition of Justice Stewart's finding that Section 8(d) is a statute delineating limits. It said that the concept of "terms and conditions of employment" is deliberately broad and Congress intended it to be so. Yet, while embracing the circuit courts concern that a core rule and the discipline to be associated with it are to be considered together (thus, generally denying to an employee disciplined for its breach the right to bargained-for representation), it did agree with Judge MacKinnon that there may be exceptional cases for which an excessive penalty renders a rule mandatorily bargainable. I find myself in sympathy with all points of view here, but believe the Board had it right in *Capital Times* when it allowed for the bargaining severability of the rule and its discipline. The rule announced in the remand seems awfully brittle and destined to have unjust results.

Of course, plant rules, in general, have been held to be mandatory bargaining topics. *Womac Industries*, 238 NLRB 43 (1978); *Electi-Flex Co.*, 238 NLRB 713, 731 (1978). Yet there are obviously areas of rule making (employee ethics being the above-cited example) which are not covered by Section 8(d). No one questions, for example, at least in the absence of Section 7 restraint or coercion, an employer's unilateral right to set rules insisting on basic employee attributes such as honesty, sobriety, civility, good health,[8] and competence. Of course there may be reasonable disputes over the application of these rules or whether a rule has been breached, but no one seriously argues that setting rules on those subjects is not within the employer's exclusive power. Congress, when passing Section 8(d), did not place those matters into the bargainable arena. Case law on these basic subjects, free of union animus complications, are nonexistent, no doubt due to universal recognition of that fact. If journalistic ethics also fall within that category, where then does a total ban on smoking fall? Is it within the area left to employers by Congress or is it in the bargainable arena?

I am persuaded that the mandatory nature of a smoking ban depends on which direction the parties wish to go. Do they wish to create a more healthful or less healthful working environment? Here, it seems to me that Respondent has taken steps to improve the health of its employees while the Union and the General Counsel seek only to maintain a less healthy environment. Usually a bargaining topic is mandatory or nonmandatory on its own terms no matter what direction a party wishes to go. *NLRB v. American National Insurance*, 343 U.S. 395, 404 (1952). Yet, when it comes to employee health, however, I conclude that the analysis does not obtain. It is clearly the nation's public policy, as set forth in various Surgeon Generals' reports, to try to control the nation's health costs by eliminating or reducing smoke-related diseases such as cancer, emphysema, and chronic bronchitis. These diseases have contributed greatly to the cost of health and have made workers less productive. The Federal Aviation Administration accepted that policy on February 25, 1990, when it banned smoking on domestic commercial flights. I find, therefore, that the General Counsel and the Union are on the wrong side of this issue here, at least insofar as their position is inconsistent with national health policy.

But even insofar as national labor policy is concerned, it is inappropriate for the General Counsel, as representing the Government's point of view here, to be asserting that a union has the right to allow workers to degrade their own health as well as that of fellow employees who may inhale secondhand smoke. It was the purpose of the Wagner Act to allow labor unions the right to seek to improve their working conditions in the belief that improved working conditions would better contribute to the well-being of our society. Under the Wagner Act and its amendments workers were impelled to negotiate better wages and more healthy working conditions. In large part, of course, that has happened. This Union, however, joined by the General Counsel, seems to wish to go the opposite direction. That is contrary to the policy of the Act.[9] Moreover, like honesty, sobriety, civility, good health, and competence, a smoking ban is insoluble from a bargaining standpoint. It is just not the sort of rule which is subject to the marketplace, amenable to give and take. And, to use the *Capital Times* phraseology, smoking is not necessary to enable an employee to do his or her job. It is better, I think, to recognize that total bans on smoking fall within Justice Stewart's area of indirect impingement on job security. I conclude that an employer's total ban on smoking is a nonmandatory subject of bargaining.[10] Therefore, Respondent was free to implement it without the Union's consent.

This result is to be distinguished from other situations such as a partial ban or a union's demand to totally ban smoking. It may appear anomalous to so conclude, but I do not think it is. As I observed in the beginning of this discussion, it is not unusual, in unilateral change jurisprudence, depending on which party wants what from the other, to find oneself in unfamiliar territory. Symmetry is not always possible, nor is it always desirable. In any event, it is clear from an analysis of the cases that the Board has never squarely been asked whether an employer's unilateral total ban on smoking is a mandatory subject of bargaining. Naturally enough, therefore, it has not answered that question. It is true

[8] The Congress and the various states have imposed their values relating to employee good health in enacting statutes protecting the handicapped. Yet, it is quite clear that those laws describe rights much different from those referred to in Sec. 8(d).

[9] Frankly, I find it difficult to believe that a labor organization would want to bargain over a total ban at all. Labor unions, like most groups, are made up of smokers and nonsmokers, some of whom are most militant in insisting upon their point of view. If that issue came to debate on the floor of a union meeting, I suspect it would be most divisive and might have unwanted internal political effects. It seems to me that most unions would not want to tackle the issue for that reason alone. Leaving it to the employer at least takes it out of the political environment and lets him take the heat (which this employer wants to do).

[10] I recognize that there are cases decided by the Federal Labor Relations Authority in the federal sector which have required federal employers to bargain over similar bans. I regard those cases as distinguishable for the statute under which they have been decided is significantly different from Sec. 8(d). *Department of Health and Human Services, Indian Health Service, Oklahoma City*, 31 FLRA No. 33 (1988), 132 LRRM 2492 (D.C. Cir. 1989); *Fort Leonard Wood*, 26 FLRA 593 (1987). That statute requires a federal employer to bargain unless the rule is within the Agency's authority to set "technology, methods and means" of performing work. [Federal Service Labor-Management Relations Act, Sec. 7116(a)(1) and (5).] Sec. 8(d) of the NLRA approaches the question of bargainable issues from a totally different direction and is simply not comparable.

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that the Board has had smoking issues come up before, and has even found unlawful unilateral changes. See the cases cited by the General Counsel, *Albert's, Inc.*, 213 NLRB 686 (1974), and *Chemtronics, Inc.*, 236 NLRB 178 (1978). Yet those cases are facially distinguishable. Both were in the context of reprisals for union activity and neither analyzes whether smoking is a bargainable subject as defined by Section 8(d). It was simply assumed to be the case. Moreover, they fall within a group of cases where the analysis is affected by union animus. I do not suggest that union animus is a factor to be considered in unilateral change cases, but only observe that where it is present, less consideration is often given to the bargaining duty analysis because it is unnecessary to the outcome, particularly where clear mandatory subjects are included in the change.

Possible anomalies aside, I conclude that a union seeking a more healthy work environment acts consistently with the Wagner Act when it asks an employer to eliminate the hazards of tobacco smoke. It is acting for the good of the whole, not the personal needs of some. Therefore, I do not find it disharmonious to hold that a union's demand to eliminate, or partially eliminate, smoking is a mandatory topic which an employer must meet, while an employer need not meet with the union if it has eliminated or intends to eliminate the hazard altogether. Likewise, if an employer only intends to partially eliminate smoking, and the union wishes to bargain over that, either for the purpose of extending the ban or for arranging the manner of controlling smoking, it must do so, for partial bans under my analysis must be bargained. Indeed, if I had been asked, I would have found that an employer who imposes a total ban, after having allowed smoking, would be obligated to bargain over the effects of the change. This would allow bargaining for such things as an adequate transition period or even to ask an employer to pay for cease-smoking programs. That would still leave the ban itself within the employer's exclusive domain.

Even if one were to find a smoking ban unilaterally imposed by an employer to be a mandatory subject of bargaining, I would be forced to conclude, on this record, that there is really no significant impact on Respondent's employees' working conditions. First of all, bargaining unit employees had never been allowed to smoke while performing their regular work tasks. Smoking had been permitted only on breaks and in locations away from the production area. Thus there was already a near-total ban in place. On January 1, 1989, the ban was simply extended to eliminate the smoking havens. Employees still receive the same number of breaks and are privileged to go to the same breakrooms as before for the same length of time. Now, however, a nonsmoker may enter a breakroom where smoking had previously been permitted but without having to encounter secondhand smoke. The fact that smokers must now make a difficult trek in a short period of time to find a nonmill location to smoke is a matter of their own choice. They are the ones who have chosen to become addicted to tobacco and who have chosen to take the health risks associated with it. Theirs is a personal condition which they have imposed upon themselves; not a condition which the employer has set. Thus Respondent is simply telling its employees that if they choose to take this health risk, it is their own responsibility, but they must do it at a location where the Employer cannot be seen as having encouraged it in any way. The impact of this ban, although perhaps subjectively important to the smoker who has been denied the privilege, is, objectively speaking, not much. It has no significant impact on their working conditions, nor is smoking necessary to a successful break. Accordingly, I would dismiss this case on that ground as well. See *St. John's General Hospital*, 281 NLRB 1163, 1168 (1986) (smoking ban during shift change did not have significant impact).

Continuing to assume that an employer's unilateral smoking ban is a mandatory subject of bargaining, I would find that Respondent, beginning at least with its meeting of August 25, 1988, advised the Union of its intention to impose the ban. The Union counterproposed at least two locations where smoking might be allowed but no agreement was reached. The Union could have continued to seek to bargain over the subject but did not, probably in the view that it would have been futile. Yet, the Union did not test the Company's resolve, although articles V and VI of the new collective-bargaining contract do provide the procedure for resolution.[11] Indeed, article V, section D states that if the grievance is not referred to the Federal Mediation and Conciliation Service within 30 days, it "shall be conclusively waived." There is no evidence in this record that the matter was ever submitted to the FMCS as contemplated by article VI. Accordingly, it is not unreasonable to conclude that the grievance has indeed been waived "conclusively" by the contract. Compare *E. I. du Pont & Co.*, 294 NLRB 493 (1989) (taking away smoking and other privileges in locker room not an unlawful unilateral change as union waived claim by not pursuing grievance). Finally, although not argued by the parties it seems likely that the management's-rights clause is broad enough to constitute the Union's waiver of the right to bargain over the ban. See *Laredo Packing Co.*, 254 NLRB 1, 8, 9 (1981). I hesitate to make that finding, however, as none of the parties have raised or briefed the issue.

Thus on two grounds, if not three, it would appear that the Union chose to waive the right to bargain. The first occurred when the employer gave it notice and the opportunity to bargain but it made only a desultory effort to do so. *Citizens National Bank of Willmar*, 245 NLRB 389, 390 (1979). The second occurred when it tried to grieve the matter but abandoned it at the pre-FMCS stage.

I conclude that the complaint should be dismissed. I reach this conclusion based on my finding that the topic is a nonmandatory subject of bargaining and that Respondent had no obligation to bargain over its imposition of a total ban on smoking at its Peshastin mill. Alternatively, I find that even if the ban is a mandatory subject of bargaining, it had no significant impact upon the employees' working conditions. As a second alternative, I find that Respondent gave the Union an opportunity to bargain over the subject. When the Union declined to pursue the matter it waived, either by passivity or by its abandonment of the grievance procedure, any objections it may have had to this change. Accordingly, I make the following

[11] Art. V of the new contract is the grievance procedure. It does not, however, lead to arbitration. Art. VI is a limited no-strike clause which requires the parties first to seek the assistance of the Federal Mediation and Conciliation Service to resolve grievances. If they are unable to reach a satisfactory resolution of the grievance, that clause provides certain procedures leading to a strike.

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CONCLUSIONS OF LAW

1. The Respondent, W-I Forest Products Company, a limited partnership, is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Charging Party is a labor organization within the meaning of Section 2(5) of the Act.

3. The total ban on smoking which Respondent imposed upon its employees at its Peshastin, Washington plant on January 1, 1989, does not breach the bargaining obligation of Section 8(d) of the Act as the ban does not constitute a mandatory subject of bargaining and therefore Respondent did not violate Section 8(a)(5) and (1) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[12]

ORDER

The complaint is dismissed in its entirety.

[12] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

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